3-10-1976

Garnett Clark v. Tarzan, Inc.

Appellee's Brief 1975-SC-1173

APPELLEE'S BRIEF

IN THE

SUPREME COURT OF KENTUCKY

File No. 75-1173

GARNETT CLARK - - - - Appellant

v.

TARZAN, INC. - - - - - - - Appellee

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE J. HOWARD HOLBERT, JUDGE

BRIEF FOR APPELLEE

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I hereby certify that a true copy of the foregoing was this 11th day of March, 1976, served by mail on Mr. Paul M. Lewis, Lewis Bland & Preston, 30 Public Square, Elizabethtown, Kentucky, 42701, Attorney for Appellant, and Honorable J. Howard Holbert, Trial Judge, Hardin County Courthouse, Elizabethtown, Kentucky, 42701, pursuant to RCA 1.250.

Harold K. Huddleston
Harold K. Huddleston

ROBERTS PRINTING CO., FRANKFORT, KY.

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STATEMENT OF THE QUESTION PRESENTED

Where no answer is filed to a complaint, based on a foreign judgment, within twenty-eight days, and there is no showing of a legal justification for the failure, was the refusal of the lower court to set aside the judgment an abuse of discretion?

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GARNETT CLARK - - - - - - - *Appellant*

V.

TARZAN, INC. - - - - - - - - *Appellee*

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BRIEF FOR APPELLEE

May it please the Court:

COUNTERSTATEMENT OF THE CASE

a. Statement of the Proceeding:

This is an appeal from a default judgment entered twenty-eight days after service of Summons, and the orders of the lower court denying Appellant's two requests to set it aside.

b. Statement of Facts:

This action was commenced by complaint filed August 6, 1975, alleging a right of recovery based upon a judgment of the Hamilton County Municipal

Court, State of Ohio. That court had determined that it had jurisdiction to render the judgment.

In July, 1975, the appellant had notice that an action would be filed in Hardin County to enforce that judgment (T.R. 20). On September 15, 1975, Appellant was served with summons (T.R. 21). For sixteen or seventeen days Appellant did nothing. On October 1 or 2, he dropped by the office of counsel for Appellee to tell him that "he did not feel that he owed the plaintiff anything and was not going to pay him anything" (T.R. 21). He was informed that he should consult a lawyer and that he had until October 6, which was a Monday, to file an answer. No answer was filed by October 9, and there is no claim that any contact or any request for additional time in which to answer was made before October 14, 1975, when Appellant attempted to file a late answer, and the day the judgment was entered (T.R. 13).

On October 14, 1975, Appellant filed a motion to require Appellee to post a bond and to file an attached answer and counterclaim. The motion stated no grounds for the request to file a late response and was not suported by affidavit or other showing of an excuse for not previously filing an answer (T.R. 9-12). On the same day, Appellee's motion for default judgment, which had been filed on October 9, 1975, was sustained and the judgment entered. The record is silent as to the time that the judgment was signed.

On October 15, 1975, Appellant filed a motion, for hearing on October 21, 1975, to set aside the judgment and "to rule on Defendant's motion heretofore filed herein for leave to file answer." (T.R. 14).

There were no grounds stated in the motion and again no cause shown for failure to file an answer within the time allowed by C.R. 12.01.

After hearing Appellant's motion, the circuit court overruled same by order entered October 28, 1975 (T.R. 19).

On the same day, Appellant filed his motion "to reconsider the motion heretofore made to set aside the judgment and to allow the filing of the Defendant's Answer, and in support of said motion files herewith Affidavit of Defendant, Garnett Clark." (T.R. 18). Again there were no grounds stated in the motion which would require or justify the relief sought.

A counteraffidavit and objection were filed to the second motion (T.R. 20). After a second hearing and after considering the record, the lower court overruled the motion by order dated November 7, 1975, (T.R. 22).

ARGUMENT

The Lower Court Did Not Abuse Its Discretion In Refusing to Set Aside the Default Judgment.

Appellant did not favor the circuit court with a statement of the legal grounds for a motion to set aside the judgment, nor has he specifically done so in the brief to this court. A review of his brief seems to indicate that his argument is that any party with a claim of a defense should not be held to the requirements of CR 12.01, and should be permitted to file a late answer or have a default judgment set aside without any showing of cause. The only other point

discussed by the brief seems to contend that fraud was practiced upon the appellant by Appellee's counsel.

Appellant cites the cases of Johnson v. Gernert Bros. Lumber Co., 255 Ky. 734, 75 S.W. 2d 357, and Dark Tobacco Growers' Co-op. Ass'n. v. Bevins, 216 Ky. 121, 287 S.W. 355. In the Johnson case the defendant had filed a proper answer and had appeared ready for trial on two occasions. On the third occasion neither the defendant nor counsel appeared and default judgment was entered. Opposing counsel had, prior to the third trial date, assured the defense counsel that he would be notified when the case was again set for trial. This notice was not given and the appellate court held that the default judgment should be set aside.

In the Bevins case the lower court set aside the default judgment on the grounds that the defendant had been misled into believing that the case would be settled and that he had been promised that no action would be taken pending the settlement. The opinion upholding the lower court pointed out that due weight was given to the findings of a chancellor.

Neither of the above cases touches upon the fact situation presented in this appeal. The defendant failed to take any action for sixteen days after he was served. He then went by the office of the appellee's attorney to state that he was not going to do anything. If any fraud was to be practiced upon the defendant, he would surely not have been encouraged to seek legal advice before the time ran for filing an answer. Appellant's brief boldly states that Appel-

lant advised this writer that Mr. Lewis was tied up in court and would be for three or four days, and that Appellee's attorney advised the appellant that he would give him extra time to have a chance to talk with Mr. Lewis. This is an absolutely incorrect statement—incorrect as to fact and unsupported by any claims contained in the record. The affidavit of Garnett Clark, found at T.R. 16-17, is more striking by what it fails to say than what it says. For instance, it says that the summons "said" to go see the attorney for the plaintiff." The affidavit also says that the appellant stated that he was going to hire the law firm of Lewis, Bland and Preston, but it makes no reference as to when that statement was made or in what context, nor does it give any indication that he had previously discussed the matter with any of these attorneys or that he knew that Mr. Lewis was going to be tied up in court. The affidavit also claims that the attorney told him that he would give him additional time but there is no mention in which context that statement was made or how much time was to be given.

The affidavit of Appellee's counsel set out, as nearly as he could recollect, the events as they occurred. When the appellant stated that he planned to do nothing in response to the suit, he was encouraged to consult an attorney before making that decision. He stated that he did not know any other attorney but that Attorney Paul Lewis lived in his area. He obviously had not made any contact with that attorney or any other, and, therefore, was not in a position to state that the attorney would be tied up

for three days or any other period of time. The appellant was told that the last date for filing an answer would be October 6, and nothing would be done on or before that date, giving him an opportunity to consult with an attorney. In fact, when the appellant left, he gave every indication that he still did not plan to discuss the matter with an attorney and that he had no concern for a default judgment being entered against him. This conversation took place on October 1 or 2. The default judgment was not entered for almost two weeks, within which time there is absolutely no showing that the defendant was fraudulently or otherwise kept from protecting his interests by either filing a response or requesting additional time from Appellee's counsel.

In the case of Richardson v. Brunner, Ky., 327 S.W. 2d 572, the lower court's refusal to vacate the default judgment was affirmed upon appeal. The appellant had made three motions to vacate and appealed from a denial of each. Although it was not clearly established, the court assumed that the defendant had a valid defense and specifically stated that that fact did not entitle the defendant to the relief sought. At page 573, the court stated: "He must explain why he did not present that defense upon the trial and thus excuse his default. Dant v. Progress Paint Mfg. Co., Ky., 309 S.W. 2d 187."

In that case there were also claims of misrepresentation and negotiations, but the lower court's determination that sufficient grounds were not proved to set aside the judgment was supported by evidence, and, therefore, were upheld. At page 574, the court stated:

> In the second and third motions Richardson makes the bare assertion that he is moving under CR 60.02 and states not a single fact upon which he may base his right to use the rule for relief. Facts are stated which may have been quite pertinent to a defense of the original action but none are asserted either in the motion or by supporting affidavit to show why he was prevented from asserting those facts in the original action. In other words there is nothing in either of the motions which tends to explain the default. In Dant v. Progress Paint Mfg. Co., Ky., 309 S.W. 2d 187 we explicitly held that, under those conditions, the moving party is presumed to have no explanation. The showings made in the second and third motions are wholly insufficient and the trial court was correct in denying the relief sought.

In the case of W. R. Crowder v. American Mutual Liability Insurance Company, Ky., 379 S.W. 2d 236, the refusal by the lower court to set aside the default judgment upon the claim of excusable neglect, was sustained in circumstances somewhat similar to those at hand.

In the case of Vinson v. Chadwick, Ky., 507 S.W. 2d 181, a default judgment was taken approximately twenty-two days after service and the lower court refused to set aside same upon Defendant's motion. No abuse of discretion was demonstrated and the judgment was allowed to stand.

The case of Jacobs v. Bell, Ky., 441 S.W. 2d 448, presented a situation similar to the case at hand. Default judgment was entered on October 13. On November 1, Appellant moved to set it aside, stating his

grounds for said motion but filing no affidavit, answer, or other papers with the motion setting out the circumstances. That motion was overruled November 17. On December 19, Appellant filed a second motion and thereafter, on December 29, again moved to set aside the judgment, supporting the latter motion with a statement that there was a valid defense and two affidavits which tended to establish the appellant's neglect in failing to send his attorney the summons. The appellate court refused to disturb the circuit court's judgment, stating:

> Proper practice would certainly require the timely showing of the circumstances and the assertion of a meritorious defense. See Clay's Kentucky Practice, Vol. 7, Rule 55.02, Comment 2; Kidd v. B. Perini & Sons, 313 Ky. 727, 233 S.W. 2d 255. In the absence of such a timely showing, we cannot say the trial court abused its discretion.

Appellant cites the case of Ryan v. Collins, Ky., 481 S.W. 2d 85. In that case the discretion of the lower court in refusing to set aside a default judgment was upheld and the court stated that the granting of relief from a default judgment is a discretionary matter with the trial court. In the case at hand the trial court considered the record and all matters before it and determined that the appellant had not made sufficient showing to justify the relief sought. The granting of a default judgment was held not to be an abuse of discretion and not to be arbitrary on the part of the trial court in the recent case of Carnahan v. Yocom, Ky., 526 S.W. 2d 301.

CONCLUSION

The wording of CR 60.02 and the case law cited above clearly establish that the granting of the relief from the default judgment is discretionary with the trial court and will not be disturbed except upon a clear showing of abuse. It is respectfully submitted that there is no showing of such abuse in this case.

Respectfully submitted,

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